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July 23, 2012

Via Email & First Class Mail

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Office of Environmental Information (OEI) Docket (Mail Code 2822T)
Docket # EPA-HQ-ORD-2012-0276
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
ORD.Docket@epa.gov

Re: State of Alaska's Comments on Legal and Process Issues Relating to the Environmental Protection Agency's May 2012 External Review Draft of "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska;"
Docket # EPA-HQ-ORD-2012-0276

Dear Ms. Jackson and Mr. McLerran:

I am submitting this letter on behalf of the State of Alaska, detailing the State's comments on legal and process issues relating to the U.S. Environmental Protection Agency's (EPA's) May 2012 "External Review Draft" of "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska," also frequently referred to as EPA's draft "Bristol Bay Watershed Assessment" (hereinafter Assessment). Director Tom Crafford with the Alaska Department of Natural Resources' (DNR's) Office of Project Management and Permitting (OPMP) is also submitting a separate letter today containing the State's detailed technical comments on the Assessment.

EPA acknowledges that this Assessment was initiated in response to a petition[1] requesting that EPA exercise its Clean Water Act (CWA) Section 404(c) veto authority[2] on discharges associated with mining at the so-called Pebble project, a project located on State land. Integral to all of the State's comments on EPA's draft Assessment are the core points that if permit applications for a detailed mining proposal for the Pebble project are submitted,

- the U.S. Army Corps of Engineers (Corps) and the State's permitting systems require rigorous environmental review of those applications that will consider a wide array of public interests,
- any permits that may be issued would apply EPA-approved Alaska water quality standards, both for a mine at Pebble or any other location in the state, and
- EPA plays a prescribed part in the Corps' and the State's permitting reviews.

As you know, I earlier submitted comments to you regarding EPA's Assessment effort, via letters dated March 9, 2012 and April 17, 2012. Copies of those letters and the referenced materials are enclosed. The comments in those letters discussing the State's concerns are still relevant and are incorporated herein by reference as the State's comments on the draft Assessment, as well as any final Assessment and future CWA Section 404(c) action that EPA may take based on EPA's consideration of the Assessment.[3] These concerns include:

- the Assessment is premature;
- EPA lacks authority to conduct the Assessment and the Assessment conflicts with federal and Alaska law;
- the lack of sufficient scientific data and an actual permit application undermines the Assessment's scientific credibility;
- EPA's development of the Assessment disregards federal and Alaska laws, processes, and permits, and the Alaska Constitution; and
- EPA's broad and unreasonable assertion of regulatory authority to conduct the Assessment based on a general statutory provision upsets the property rights of the State and other third parties and unnecessarily raises difficult and sensitive takings questions.

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[1] *See, e.g.*, http://yosemite.epa.gov/R10/ECOCOMM.NSF/88b658c26295935488257846008349 74/e3c2faafb80b72538825788e0072ab99!OpenDocument (stating, "[w]e launched this study in response to concerns from federally recognized tribes and others who petitioned the agency;" EPA press release dated February 7, 2011 (stating that EPA "initiated this assessment in response to concerns from federally-recognized tribes and others who petitioned the agency in 2010 to assess any potential risks to the watershed").

[2] 33 U.S.C. § 1344(c). The petition specifically requested EPA commence and exercise its authority under CWA Section 404(c). May 2, 2010 petition submitted to EPA's Lisa Jackson and Dennis McLerran.

[3] EPA's written responses to these two letters did not allay any of the concerns and issues raised by the State and, from the State's perspective, EPA's letters fail to justify EPA's unprecedented action in developing the Assessment.

Further to the issues and concerns earlier raised by the State, as well as the State's detailed technical comments submitted today, I also provide the following additional comments on the Assessment and EPA's efforts surrounding it.

I. EPA's decision to prepare the Assessment and related efforts are an unlawful expansion of EPA's Section 404(c) regulatory process, in violation of the CWA, Administrative Procedure Act (APA), and the 1992 Memorandum of Agreement (1992 MOA) between EPA and the U.S. Army Corps of Engineers (Corps).

To date, EPA has failed to point to any regulations that support the review it is conducting, and the mere citation to a statute of general applicability (CWA Section 104) does not provide adequate support for the action EPA is taking. EPA's reliance upon the Assessment to address a petition is a novel departure from not only the Section 404 permitting regime, but the shared state-Corps-EPA regulatory scheme reflected overall in the CWA.[4] Indeed, the CWA *recognizes*, *preserves*, and *protects* "the *primary responsibilities and rights* of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[5] Thus, Congress reserved to the states primary regulatory authority over land and water use under the CWA, consistent with the Tenth Amendment to the U.S. Constitution.

EPA's decision to prepare the Assessment to provide the foundation upon which to respond to a petition for 404(c) action on the Pebble Project is a final agency action that imposes substantive changes to the Section 404 permitting process and the more limited process provided to EPA in the regulations promulgated under Section 404(c) and the 1992 MOA. *National Mining Association v. Jackson*, 768 F. Supp. 2d 34, 44-45 and 49 (D.D.C. 2011) (holding that EPA's actions adopting an Enhanced Coordination Process (EC Process) and Multi-Criteria Integrated Resource Assessment (MCIR Assessment) were final and created a new layer of EPA review that "altered the permitting procedures under the [CWA] by changing the codified review process"); *cf. National Mining Association v. Jackson*, 816 F. Supp. 2d 37, at 45-49 (D.D.C. 2011) (holding that EPA's adoption of the EC Process and the MCIR Assessment exceeded EPA's CWA authority, and were issued without notice and compliance with the APA).

II. EPA's Assessment is based on 1998 guidance that unlawfully circumvents other applicable state and federal regulatory authorities, and reliance on the guidance in this context is arbitrary and capricious.

Making the current situation even more muddled, EPA acknowledges[6] that its Assessment was conducted based on a 1998 EPA guidance document, *Guidelines for Ecological*

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[4] 33 U.S.C. § 1251, *et seq.*
[5] 33 U.S.C. § 1251(b) (emphasis added).
[6] Assessment at 1-2.

Risk Assessment.[7] The Assessment was not based on any process described in CWA Section 104 or any regulations promulgated in connection with Section 104. The guidance EPA relies upon does not cite CWA Section 104 for authority or for any other reason. Further underscoring the evolving and vague nature of EPA's efforts relating to the Assessment and the pending petition, EPA did not state in its February 2011 announcement that it would be conducting an "ecological risk assessment." And, until the Assessment was released on May 18, 2012, EPA had not disclosed that the Assessment would be based on 1998 guidance, even though the State and others repeatedly asked on what basis EPA was formulating its watershed assessment. The regulated community and state and federal authorities with shared regulatory rights and responsibilities over mining activities could not have anticipated the disjointed patchwork of authority and guidance that EPA would rely upon to undertake the Assessment, triggered by a "petition" asking EPA to exercise its Section 404(c) authority.

In all of the studies that EPA has cited as precedent for its Assessment and to which the State could obtain copies of, the State was unable to find any instance where EPA has cited Section 104 as authority to conduct an assessment as a precursor and tool to determining whether to exercise its Section 404(c) authority in response to a petition, and in the absence of a permit application and detailed project proposal. The 1998 guidance was not promulgated as regulations to implement Section 104. It is also questionable whether the agency has adhered to the 1998 guidance, including the requirements of developing a risk characterization to "express results clearly, articulate major assumptions and uncertainties, identify reasonable alternative interpretations, and separate scientific conclusions from policy judgments.[8] In any event, EPA's application of the 1998 guidance conflicts with, *inter alia*, the CWA, NEPA, APA, and Alaska law. It unlawfully circumvents and usurps the regulatory roles held by the State and other federal authorities. EPA's reliance upon the guidance in this context is arbitrary and capricious.

III. The Assessment and EPA's reliance upon it in any exercise of CWA Section 404(c) authority usurps the State's land and water resource management prerogatives and public interest considerations preserved under, *inter alia*, the CWA and the Alaska Statehood Act.

As noted above, the subject of EPA's Assessment involves the Pebble project, which is on land owned by the State, land that the State selected and manages as open for potential mineral development.[9] The State also notes that because EPA's methodology fails to consider the socio-economic benefits of mining, EPA's Assessment and conclusions are inherently biased in favor of preservation of largely state-owned lands, and forecloses consideration of important public interests otherwise considered under the National Environmental Policy Act (NEPA), the Alaska Statehood Act, the Alaska Constitution, and Alaska law. As the State has repeatedly made clear, development of the Pebble project would only be considered through rigorous state-

[7] EPA/630/R-95/002F (April 1998).
[8] *1998 Guidelines for Ecological Risk Assessment*, at viii.
[9] *See, e.g.*, State's 2005 Bristol Bay Area Plan (BBAP), at 2-31 to 2-32.

federal regulatory review and public participation through the permitting process.[10] The State or the Corps, or any other federal agency, has not expressed any intent to rubber-stamp approval of a proposal for mining at the Pebble project. And, EPA has a prescribed part of that permitting review process. Such consideration would be given in the context of an actual permitting process under, *inter alia*, NEPA, state laws, and the State's management plan for the Bristol Bay area. *See, e.g.*, 42 U.S.C. §§ 4331 and 4332. However, EPA's preemptive review unnecessarily and unlawfully constrains full consideration of a variety of public interests by the State and the Corps concerning the use of the lands targeted by the Assessment.

For example, EPA does not meaningfully and objectively consider the State's core management plan for the area, the 2005 BBAP. The State's BBAP is cited only once, on page 6-7 in Appendix G of the third volume of the Assessment, in a discussion dealing with potential transportation plans for the Bristol Bay area. EPA's bias against these potential plans – the nature and development of which EPA fails to note would be subject to rigorous state and federal environmental reviews when and if they are permitted – is evident:

> That there is some interest in industrialization of Bristol Bay beyond the Pebble Mine is evident in various State of Alaska sources. The ADNR's Bristol Bay Area Plan from the (BBAP 2005, citing the ADOT's Southwest Alaska Transportation Plan, November 2002), lays out an

[10] The 2005 BBAP states "[t]he general resource management intent for the Pebble Copper area is to accommodate mineral exploration and development and to allow DNR the discretion to make specific decisions as to how development *may* occur, *through the authorization process.*" (Emphasis added). The 2005 plan also states:

> Mineral development in this unit is expected to be authorized after a public process that is as extensive as this Area Plan, and with the benefit of site-specific data and design that is prepared for the development and not now available. For that reason, mineral development that is subject to an extensive public and agency process that involves public meetings and comment in the area, and that involves site-specific design may require different widths and habitat-protection measures than those specified in Chapter 2.
>
> Mineral development within R06-24 should be performed in such a manner as to ensure that impacts to the anadromous and high value resident fish streams are avoided or reduced to levels deemed appropriate in the state/federal permitting processes related to mineral deposit development....

Id. at 3-112. *Cf.* September 21, 2010 letter from Alaska Governor Sean Parnell to EPA Administrator Lisa Jackson, March 9, 2012 letter from Alaska Attorney General Michael Geraghty to EPA Region X Regional Administrator Dennis McLerran, and August 8, 2011 letter from DNR Director Tom Crafford to EPA's Rick Parkin, both of which are enclosed and discuss the detailed and lengthy state and federal review to which an actual proposal and permit application would be subject before it could be permitted; these letters are incorporated by reference as part of the State's comments on EPA's draft Assessment.

> ambitious long-range vision for future development of a network of roads and highways in the Bristol Bay region (Figure 2). The roads, highways, and related infrastructure envisioned by the BBAP include "regional transportation corridors" that would connect Cook Inlet to the area of the Pebble prospect, as well as Aleknagik (already connected by road to Dillingham), King Salmon, Naknek, Egegik, and Port Heiden, and finally, to Chignik and Perryville, on the southern Alaska Peninsula. The State also foresees other "community transportation projects" that involve extensions, improvements, or new roads within or adjacent to Bristol Bay watershed (Chigniks Road Intertie, King Cove-Cold Bay Connection, Newhalen River Bridge, Iliamna-Nondalton Road Intertie, and Naknek-South Naknek Bridge and Intertie). The plans also identify three potential "Trans-Peninsula transportation corridors" (Wide Bay/Ugashik Bay, Kuiulik Bay/Port Heiden, and Balboa Bay/Herendeen Bay,) routes that could serve for roads, oil and gas pipelines or other utilities as needed (BBAP 2005, Figure 2.5).

Nowhere else is the State's 2005 BBAP cited, much less discussed, and the plan does not only address measures to assess development projects, but discusses other management tools and goals for protecting area resources, including fish resources and habitat, as well as the subsistence, commercial, and sport uses of fish. The State's prerogative under the CWA and sovereign right to plan, protect, and manage the use of state-owned land for an array of public interests is no small matter, but EPA's Assessment usurps and marginalizes the State's authority.

IV. Notwithstanding EPA's contention that the Assessment does not constitute "final agency action," EPA's Assessment renders conclusions that mark the consummation of agency action on specific issues and impacts, these conclusions are not subject to appeal, and these conclusions will have essentially binding effect on third party interests and future regulatory reviews, including EPA's consideration of Section 404(c) action in response to the pending petition.

EPA asserts that the Assessment does not "outline decisions made or to be made" by EPA.[11] Notwithstanding, EPA reaches dozens, and likely hundreds, of final conclusions in the Assessment that will have direct and appreciable legal consequences on the interests of others,[12] at the same time it fails to adequately array or account for potential mitigation measures (*e.g.*, dam design standards, response measures, and potential permit stipulations), including those that the Corps might require for a Section 404 permit or that the State might require for a CWA Section 402 permit.[13] In addition, EPA reaches non-appealable conclusions on a host of

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[11] Assessment at i.

[12] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

[13] EPA approved the State of Alaska's Section 402 permitting program in 2008. This program is also referred to as the Alaska Pollutant Discharge Elimination System (APDES) Program. AS 46.03.100 and 18 AAC Chapter 83.

other issues. For example, EPA reaches a number of firm conclusions about impacts from a potential tailings spill and efforts to remediate following the spill.[14] Another example, EPA reaches the conclusion that pipeline failures would "certainly cause long-term local loss of fish and invertebrates."[15] EPA's Federal Register Notice concerning the peer review panel acknowledges the "highly influential" character of the Assessment.[16] The State also reiterates that in establishing the peer review panel to study the Assessment, EPA explicitly cited its authority under CWA Section 404, further undermining EPA's protestations that it has not embarked on a Section 404(c) review with the Assessment.[17]

Thus, findings and conclusions regarding, among other things, risks and impacts – speculative as they are – will serve as EPA's presumptive starting point for all future regulatory reviews, including disposition of the pending petition under Section 404(c), as EPA has stated it will rely on the Assessment to address the 404(c) petition before it.[18] The Assessment, which is not subject to appeal, makes findings that will have preclusive effect in all future regulatory decisions, at least for EPA. *National Mining Association v. Jackson*, 768 F. Supp.2d at 45 (holding that "Guidance Memorandum here has a practical impact on the plaintiff's members seeking permits" and "despite EPA's assertions that the Guidance Memorandum is only an interim document, [i]t is being treated and applied in practice as if it were final." *Cf.*, *State of New York v. Nuclear Regulatory Commission*, 681 F.3d 471, at 476-477 (D.C. Cir. 2012) (holding that "[i]t is not only reasonably foreseeable but eminently clear" that Nuclear Regulatory Commission's Waste Confidence Decision "would be used to enable licensing decisions based on its findings," and while the Commission contended "that the site-specific factors that differ from plant to plant can be challenged at the time of a specific plant's licensing," the Decision "nonetheless renders uncontestable general conclusions about the environmental effects of plant licensure that will apply in every licensing decision").

V. The credibility of the Assessment is significantly undermined by the rushed nature of its development, as well as the inadequate time allowed for public and peer review.

The State believes that the scientific credibility of the Assessment is significantly undermined by the very short time frame in which EPA prepared the Assessment (approximately one year), as well as the short window of time that EPA provided for public review and comment (60 days) and peer review. The State sought both a 120-day extension of time on the public review period for the Assessment, as well as access to the Assessment's underlying reference

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[14] 6.1.6 and 6.1.7 (6-29).
[15] 6.2.1.3 (pages 6-34-45).
[16] 77 Fed. Reg. 40039-40 (2012).
[17] *See* http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/html/2012-4325.htm.
[18] "Once EPA's assessment has undergone public and peer review and has been finalized, the agency will use the assessment and other available information, including industry data submissions, to inform future decision making." Enclosure 1, page 1, to June 22, 2012 letter from EPA's Associate Administrator Arvin Ganesan to Representative Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives.

materials in a letter dated May 29, 2012 (enclosed). It did so for a variety of reasons that are recapped here:

- The three-volume Assessment totaled more than 1,000 pages. The executive summary, Assessment, and nine appendices to the Assessment include cited references totaling roughly 2,000 documents that are not contained in the three-volume Assessment, but upon which EPA, its contractors, and other agencies apparently relied. In short, this is a voluminous amount of complex information that requires thorough public review and comment. Normally, such information for a specific proposed project takes several years to gather and be scientifically vetted and scrutinized by multiple state and federal agencies, but that has not occurred here.

- The peer review members that EPA empaneled will be studying, meeting, discussing, and presumably advising EPA on the sufficiency of the Assessment until early fall. Based on EPA's publicly released information regarding the panel's schedule, presumably the panel will be releasing its findings in September. The public should be allowed to access all of the information generated and considered by this panel (including its findings, comments, conclusions, reference materials, etc.), as well as to question the panel members, so that the panel's information can be probed as part of the public's comments. Thus, the State reasonably asserted that public comment should close at least 60 days *after* the panel has concluded EPA's charge and the panel's information released. Requiring the public to comment by July 23, well in advance of the release of the panel's information and meetings, and while many Alaskans are engaged in commercial fishing and/or subsistence activities, promotes an unnecessarily rushed process.[19]

- The draft Assessment involves important questions of state and federal law, including under the CWA, many of which implicate state rights and a vast amount of state lands. The state, and the public, need adequate time to study these issues and offer public comment.

In its May 29 letter, the State also suggested that EPA post the reference materials on its Bristol Bay Watershed Assessment website for ready public access and to allow for meaningful

[19] The State also notes that one of the charge questions to the peer review panel is "[w]ere any significant literature, reports, or data missed that would be useful to complete this characterization, and if so what are they?" The EPA also asks the panel whether "there is significant literature, reports, or data not referenced that would be useful to refine [the hypothetical mine] scenarios, and if so what are they?" It defies credibility that the panel members would have any time to research and determine whether information was missing that was necessary to prepare the Assessment and make it complete, in addition to their assignment to review the Assessment and attempt to answer the charge questions. Notwithstanding, among the obvious key pieces of missing information is a Section 404 permit application and project proposal, along with an associated Section 404 permit application and NEPA review that reflects the input of the Corps, other federal agencies, and the State.

public comment. Notwithstanding, in a letter dated July 5, 2012, EPA declined both the State's request for an extension of the public comment period, as well as request for ready access to the Assessment's reference materials.

While EPA has not expressed a reasonable basis for its accelerated development of the Assessment or the extremely short process it is allowing for public and State participation, the State is concerned that EPA is rushing this review at least in part as a response to assertions made in the May 2, 2010 petition. The petitioners requested that EPA commence a Section 404(c) public process now because the petitioners alleged that the State's 2005 BBAP is flawed.[20] Petitioners assert that if EPA proceeds with its Section 404(c) authority now, before a Section 404 permit application is submitted,[21] such action would allow the Corps, EPA, and other agencies to avoid having to consider the State's 2005 BBAP in an environmental impact statement (EIS) prepared in accordance with NEPA, a process which requires consideration of state management plans.[22] Implicitly, petitioners argue that because EPA is *generally* exempted from complying with NEPA's requirements in the absence of a permit application,[23] EPA's preemptive review can forego consideration of state management plans. Such unlawfully preemptive action, facilitated by this truncated Assessment process, directly violates CWA Section 101(b).[24] EPA does not have plenary authority to thwart consideration of state land and water management plans, given the regulatory and land management roles outlined for the states, EPA, and the Corps under the CWA and other applicable laws.[25]

In short, Alaska believes this premature Assessment and the highly accelerated process that EPA is embarked upon is not well-founded in law and simply inadequate, when compared to the rigorous environmental reviews that are assured with a specific mine proposal and permit application, a review that would require several years and the expertise of multiple agencies at the state and federal levels (including by EPA). Given (1) the extremely short time-frame that EPA has allowed for public review of the draft Assessment, (2) EPA's decision not to provide full and immediate access to the reference materials EPA relied upon in developing the

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[20] May 2, 2010 petition, at 6-8. The petitioners acknowledged that they have challenged the validity of the 2005 BBAP in state court. *Id.* at 7, n.20.

[21] Pebble Limited Partnership, in press comments, has stated that it expects to submit permit applications for the Pebble project, including for a Section 404 permit, in late 2012.

[22] Petitioners cite NEPA regulation 40 C.F.R. § 1506.2(d), which provides that

> [t]o better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

[23] 33 U.S.C. § 1371(c).

[24] 33 U.S.C. §12.51(b) (the states retain the primary responsibilities and rights "to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."

[25] *Mingo Logan Coal Company v. U.S. Environmental Protection Agency* (D.D.C. 2012), Case No. 10-0541 (ABJ).

Assessment, (3) EPA's protracted and not yet completed response to the State's Freedom of Information Act request relating to the Assessment, (4) the timing of the associated peer review, and (5) EPA's action to address the petition pending before it, the State expressly reserves the right to raise additional comments and concerns at a subsequent date.

VI. EPA's Assessment appears to violate the Data Quality Act.

Given the rushed timing of the Assessment, short public review and comment period, and lack of access to the underlying works referenced and relied upon in the Assessment, EPA has not assured the use of quality data in conducting its Assessment. EPA states: "Where possible, we have relied on peer-reviewed, published data and information. However, much of the information on Bristol Bay has not been published in the peer-reviewed literature."[26]

The Data Quality Act (DQA) requires federal agencies to use accurate, quality data, free of conflicts of interest.[27] EPA is subject to the act. The federal Office of Management and Budget (OMB) issued final guidelines for federal agencies to assure compliance with the act.[28] Those guidelines provide that in the scientific and research context, there is a presumption in favor of peer reviewed information. And OMB instructs that prior to dissemination, federal agencies should responsibly account for "influential scientific, financial, or statistical information" that will have "a clear and substantial impact on important public policies or important private sector decisions,"[29] such as those clearly at stake here.

EPA issued guidance in October 2002 in response to OMB's final guidelines.[30] At the outset, EPA notes that one of its goals is for "communities, individuals, businesses, State and local governments, Tribal governments – [to] have access to accurate information sufficient to effectively participate in managing human health and environmental risks."[31]

EPA also issued a May 5, 2000 Order and revised EPA Quality Manual for Environmental Programs, CIO 2105.0 (formerly 5360 A1), directing EPA to use quality data in its work, and to also put into place a system that vets information to ensure it is quality data. EPA's Quality Policy and Procedures, dated October 21, 2008, expect assurance of quality EPA products and services.[32] EPA's *Science Panel Council Peer Review Handbook* requires that for highly influential scientific assessments, the underlying work product of third parties, including other federal agencies, industry, and environmental groups, that are relied upon in the assessment be peer reviewed.[33]

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[26] Assessment at xiv.
[27] Pub. L. No. 106-554; H.R. 5658; § 515 Appendix C, 114 Stat. 2763A-153 (2000).
[28] 67 Fed. Reg. 8452 (2002).
[29] 67 Fed. Reg. 5360.
[30] *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (EPA/260R-02-008 October 2002).
[31] *Id.* at 3.
[32] CIO 2106.0 and CIO 2106-P-01.0.
[33] EPA *Science Panel Council Peer Review Handbook* (2006 3rd ed.), at 41, § 2.2.17.

Without ready access to the referenced materials relied upon in the Assessment, and adequate time to review them, it is impossible to verify whether the materials are appropriately cited for the Assessment and whether they have been reviewed in light of the DQA, Peer Review Handbook, EPA Quality Manual, and EPA Quality Program Policy and Procedures, have been peer reviewed, and are free of conflict of interest. EPA does not indicate which materials have not been peer reviewed, let alone whether or not EPA views a specific work product exempt from peer review. Nor does having a peer review panel analyzing the Assessment and its appendices,[34] but not the underlying reference materials, excuse the use of non-peer reviewed work product for what EPA readily characterizes as a "highly influential scientific assessment."

Closing Comments and Recommendations

As you know, while the State of Alaska has provided or made available factual information to EPA over the last several months at EPA's request, this information sharing by the State should not be construed as endorsing the process, findings, or conclusions that come out of EPA's Assessment. We believe that EPA's actions in using the Assessment to address the pending petition are unlawfully preemptive, premature, arbitrary, capricious, and vague.[35]

The State once again asks that EPA cease its work on the Assessment. We also ask that EPA refrain from considering the exercise of its Section 404(c) authority until a Section 404 permit application has been submitted, including a detailed project proposal, and after other applicable regulatory reviews are conducted.

The State appreciates EPA's consideration of the significant legal, process, and technical concerns raised in the State's comments on the draft Assessment. Should you have any questions regarding the foregoing, or wish to schedule a meeting to discuss the State's comments and concerns regarding the Assessment, please contact Deputy Attorney General Jim Cantor, (907) 269-5100, with the Alaska Department of Law, or Deputy Commissioner Ed Fogels with the Alaska Department of Natural Resources, (907) 269-8431.

Sincerely,

Michael C. Geraghty
Attorney General

Enclosures

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[34] Assessment at xv.

[35] At the same time, we note that EPA has formulated a process and methodology of review without meaningfully seeking the State's input on whether the process is lawful or scientifically defensible. EPA convened only one pro forma meeting of the so-called "Intergovernmental Technical Team" (IGTT), and appeared wed to the process (vague as it was) upon which it was already engaged.

cc: Via Email & 1st Class Mail:
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